No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR-WHELAN STORES CORPORATION (a corporation), and EDGAR DEHNE, *Appellants,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	}

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

MOST OF THE EVIDENCE REFERRED TO IN APPELLEE'S "STATEMENT OF THE CASE" AND IN OTHER PORTIONS OF ITS BRIEF IS NOT WITHIN THE ISSUES OF THE CASE AND IS THEREFORE IRRELEVANT.

The rules of this court provide that no statement of the case is required in appellee's brief unless that presented by appellant is controverted (Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Rule 20, Paragraph 3). Though it does not appear even by intimation that the statement of appellants is controverted in any particular whatsoever, appellee commences its brief with a so-called "Statement of the Case", the greater part of which consists of a statement of matters not within the issues of the case and therefore not to be considered on this appeal.

The major part of the statement consists of alleged occurrences prior to the period in question, namely, March 9 to April 15, 1939. Appellee seeks to justify the inclusion of these statements and to show their materiality on the ground that the government was justified in showing a continued course of business, and that any evidence showing this, even though it concerned acts prior to the earliest date set forth in Count 1 of the indictment, namely, March 9, 1939, was relevant. However, appellee apparently overlooks the fact that while Count 1 of the indictment states that appellants carried on the business of a retail liquor dealer without payment of the tax, it limits this charge to the specific sales made to Julius N. Johnson, the government agent, and states that these specific sales constituted the carrying on of the business of a retail liquor dealer. This being the case, appellee should unquestionably have been limited in its proof to evidence concerning the making of the particular sales charged, and any other alleged conduct of appellants, either during the period in question or prior thereto, is wholly immaterial. Obviously, the alleged conversations between appellant Dehne, the other clerks, and the government agents, occurring prior to the date in question and not connected with the particular sales charged, the testimony of the government agent that on January 12 he had talked to a man who had been arrested as a drunk and who said he had purchased a bottle of alcohol from the store of the appellant United Cigar-Whelan Stores Corporation, and the testimony of the police officer that prior to and during the period in question he had observed so-called "de-horns" going

into and coming out of the store (R. pp. 111, 112) (not "frequenting" the store, as stated by appellee), and that he had seen some of the de-horns drunk (R. p. 113) (not drinking alcohol sold by appellant, as stated in the brief of appellee), are this type of testimony and are wholly immaterial to the issues in this case.

The limitation of the charge in Count 1 to specific sales made to Johnson, the government agent, was proper and was required under the law applicable to this case. However, appellee has not so limited the argument in its brief. It states therein that appellants were charged with carrying on the business of a retail liquor dealer without the purchase of the required stamp—without stating the further fact that under the indictment and the applicable statutes, the stamp was only required if it appeared that the regulation of the Commissioner of Internal Revenue (Art. 146-A, Regulations No. 3, as amended) was violated, that is, if it appeared that appellants made sales under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the articles for use for beverage purposes. From its false premise, appellee arrives at the conclusion that even though the evidence shows that the government agent did not procure for beverage purposes the only denatured alcohol which it was charged or proved that the appellants sold—that is, even though the evidence shows that the regulation in question was not violated—a general course of business of the sale of denatured alcohol was proved and this was sufficient to convict the appellants.

In order to prevent any misunderstanding, it should be made clear that the foregoing argument of appellee is manifestly erroneous. As we stated in our opening brief, there was not, and there could not be, a violation of the statutes requiring strip stamps and a retail liquor dealer's stamp unless it was proved that the appellants sold denatured alcohol *under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the articles for use for beverage purposes,* in violation of the regulation. Ordinarily, denatured alcohol and the sale thereof are not subject to the statutes applicable to alcohol that is not denatured—that is, the statutes levying a tax (evidenced by strip stamps) and requiring vendors to obtain a special stamp. (I.R.C., Section 3070, 26 U.S.C.A. 3070). It is only by virtue of 27 U.S.C.A. 153 that denatured alcohol becomes subject to these statutes. The pertinent provisions of 27 U.S.C.A. 153 read as follows:

> "Any person who shall * * * sell * * * denatured alcohol * * * in violation of laws or regulations, now or hereafter in force, pertaining thereto, and all such denatured alcohol * * * shall be subject to all provisions of law pertaining to alcohol that is not denatured, including those requiring the payment of tax thereon; and the person so * * * selling * * * the denatured alcohol * * * shall be required to pay such tax."

Therefore, only when denatured alcohol is sold in violation of laws or regulations does it become subject to the statutes levying a tax on alcohol and requiring

vendors to obtain a special stamp. There is no such "law"—using the word in the sense of an enactment of Congress—which is applicable in this case. The only possible basis for this proceeding is the claim that the sales of the articles containing denatured alcohol were in violation of the regulation in question.

Therefore, appellee's claim that it was charged and proved that appellants carried on the business of a retail liquor dealer without purchasing the stamp required begs the question, because it was essential that it be proved that a stamp was required, namely, that the regulation was violated in that sales were made under circumstances from which appellants might reasonably have deduced that it was the intention of the purchaser to procure the articles for use for beverage purposes. The necessity of proof as to specific sales was recognized by the trial judge when he instructed the jury as follows (R. p. 213):

> "Reverting to the first count, the burden is upon the government to show that on or about March 9, 1939, or the early part of this year, at 34 North Main Street, Butte, Montana, the defendants did sell one or more of these exhibits" (the exhibits being the specific bottles sold to Johnson, the government agent) "under circumstances which would cause one reasonably to deduce that the article was sold or was bought for the purpose of being drank or drunk. * * *"

We desire at this point to correct some of the other statements made bv the appellee in its argument. It is stated on page 6 that from the written statements

of the appellant Dehne and the clerks (R. pp. 96-99), it is apparent that in selling the alcohol, they made no inquiries of the individuals they sold to, used no care in its sale, and sold it indiscriminately to any person who came in and desired it for any purpose. This definitely does not appear any place in the record. The record shows that even before the period commencing March 9, 1939, the appellant Dehne and the other clerks did not sell the denatured alcohol indiscriminately, and it conclusively shows that during the period in question they did not sell the denatured alcohol to anyone who they thought intended to drink it and that prior to that period they decided to and thereafter did use care in the sale of the articles (R. pp. 149, 150, 167, 183, 184, 187).

A fair reading of the record establishes that Dehne and the other clerks did in good faith attempt to observe the regulation in question. Naturally, since such observance called for the exercise of judgment, there may have been errors of judgment, and sales may have been made which other clerks would not have made. This is not shown, however, by the sales to Johnson.

Appellee further states that Johnson's testimony shows that he made numerous and frequent purchases from Dehne and the other clerks without any inquiries being made of him as to why he needed the alcohol or what his intended use of it was. The testimony of Johnson only showed that on March 9, 1939, he made two purchases an hour apart from Dehne, on March 10 he made two purchases from Dehne approximately

nine hours apart, and on April 15 he made two purchases from clerk Walter Maenpa approximately one and one-half hours apart. On March 9 he also made two purchases from another clerk named Varco approximately an hour apart, and on March 10 he made two more purchases from Varco approximately four hours apart. It did not appear that the clerks recognized him when he returned to the store, or that there was any reason that they should have deduced that he intended to drink the denatured alcohol. He was not a drunkard, nor did he give evidence of having been drinking. His clothes were usual among the customers of the store in question. While he made ten purchases on three different days between March 9 and April 15, 1939, these were made from three different clerks, no one of whom was on duty when any other of the clerks was present. Accordingly, no one of them knew of the sales which the others made to Johnson. Although each clerk made two sales to Johnson on a single day, there were between 600 and 700 persons in the store each day, and naturally a person not a regular customer would not necessarily be remembered as having been in the store previously on the same day.

The statement of appellee that the quantity of denatured alcohol sold as compared with that sold by drug stores in Butte shows that it was sold for purposes other than legitimate use, needs no answer other than to point out that the denatured alcohol was sold for a lower price in the store of United Cigar-Whelan Stores Corporation than in any of the other drug stores concerning which there was testimony (R. pp. 103, 105, 117, 120-124, 145).

EVEN THOUGH THERE MAY HAVE BEEN SOME SLIGHT TECHNICAL DEFECT IN THE MANNER IN WHICH SOME OF THE QUESTIONS OF ERROR WERE RAISED, THE COURT CAN, AND WE BELIEVE SHOULD, NOTICE AND CORRECT THESE ERRORS.

Appellee prefaces almost every one of its arguments with the technical objection that the particular point in question raised by appellants is not properly before the court because of some claimed technical defect in the motions or objections made by appellants, and therefore "cannot" be considered by this court. In making these statements, appellee has evidently overlooked the rule enunciated by the Supreme Court in the case of *Wiborg v. United States,* 163 U.S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 at 298:

> "No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

This rule is likewise recognized in the rules of this court (Rules of the United States Circuit Court of Appeals for the Ninth Circuit, p. 23; Criminal Appeals, Rule (2d)). Certainly under these rules the court "can" consider these errors, and we believe that the errors complained of are so plain and concern matters so vital to appellants that the court will notice

them even if there may have been some slight defect in the manner in which they were first called to the attention of the trial court.

APPELLEE HAS IN EFFECT FAILED TO ANSWER APPELLANTS' CONTENTION THAT THE GOVERNMENT FAILED TO PROVE A VIOLATION OF THE REGULATION OF THE COMMISSIONER OF INTERNAL REVENUE IN QUESTION.

It was undoubtedly apparent to appellee that the point on which appellants mainly relied was that there was no proof of any violation whatsoever, the only testimony as to the sales charged being that of the government agent, and as he did not intend to and did not, nor did anyone else, drink the denatured alcohol sold, the regulation in question was not violated. However, appellee's only answer to this contention is the citation of two cases which are not even remotely in point, as we shall hereafter show, and a reference to testimony concerning alleged acts which were certainly not within the issues of this case.

APPELLEE HAS NOT DISTINGUISHED THE CASE MAINLY RELIED UPON BY APPELLANTS.

Appellee attempts to distinguish the case of *Sherman v. United States,* 10 Fed. (2d) 17, one of the cases cited by appellants, on the grounds, first, that in that case the defendants were prosecuted for an alleged violation of the National Prohibition Act, while in the instant case the prosecution is for an alleged violation of a revenue statute, and secondly, that in the *Sherman*

case the court was construing a statute while in the instant case it is construing a regulation. Appellee does not suggest any reason why a revenue statute should be construed any differently than a prohibition statute, or why a regulation should be construed more liberally in favor of the government than a statute, and we confess that we are at a loss to determine the reason for any different rule of construction, with the possible exception that a regulation should be more limited and strictly construed against the government than a statute adopted by Congress.

Appellee states that the purpose of the National Prohibition Act was to prevent intoxication and therefore, unless a sale resulted in intoxication because the purchaser drank the intoxicant sold to him, the result which the National Prohibition Act sought to prevent did not occur and the Act was not violated.

In discussing the regulation in question, appellee states that its purpose was to prevent a fraud on the revenue of the United States, which was a different purpose from that for which the National Prohibition Act was adopted. However, it appears that the real purpose of the regulation in question was to prevent the diversion of non-tax-paid alcohol to beverage purposes and therefore, unless the articles sold were used for beverage purposes, the result which the regulation sought to prevent did not occur. That this was the purpose of the regulation (and that it could have no other purpose) becomes apparent from a reading of 27 U.S.C.A. 83, the statute under authority of which the regulation was issued, the pertinent provisions of which read as follows:

> "The Commissioner shall * * * issue regulations respecting * * * the sale * * * and use of alcohol which may be necessary, advisable or proper to secure the revenue, to prevent diversion of the alcohol to illegal uses * * *"

No tax is due upon denatured alcohol, nor is it diverted to illegal uses unless it is used as a beverage. Therefore, unless it is proved that denatured alcohol is used as a beverage, the result which the regulation seeks to prevent, namely, the use of non-tax-paid alcohol as a beverage, does not occur, and there is no violation of the regulation.

THE CASES CITED BY APPELLEE ARE NOT IN POINT.

We will not repeat the argument we made in our opening brief as to the reasons that the cases we cited on this point are applicable and controlling in this case, because we believe that we have conclusively shown that that is the fact. However, as appellee has not seen fit to set forth all of the facts or the pertinent portions of the decisions in the two cases which it states announce a different rule from the cases we cited, we desire to call the court's attention to these cases.

In the case of *Burnstein v. United States,* 55 Fed. (2d) 599, it appeared that two government agents and the wife of one of them went to the restaurant operated by the defendant and ordered three "shots" of bitters. After these had been consumed by these three persons, they ordered and consumed three more

drinks of bitters. They then had sandwiches and ordered another round of bitters. While the agents were in the premises, they observed other people standing at the bar drinking red liquid out of the same kind of glasses as furnished to the agents. As far as appears from the opinion in that case, the defendant did not make the same contention we are making but, even if he had done so, it would obviously have been unavailing for the reason that the bitters in question were actually used for beverage purposes, and the defendant knew that this was the fact. The difference between the facts and the issue before the court in the *Burnstein* case and the instant case becomes apparent in the following portions of the opinion of the court (p. 603):

> "It is clear from the testimony, including that of the appellants themselves, that the bitters were sold to be drunk on the premises, that is, for beverage purposes, for a thing sold to be drunk is necessarily sold as a beverage. A beverage means something to be drunk. If the preparation sold, however, is intended by both the seller and the buyer to be used as a medicine, the sale would not be a violation of the National Prohibition Law. * * *"

(p. 604):

> "It seemed clear that when neither the seller nor the purchaser pretends to know what the medicine is good for or what the purchaser's physical condition is, and both know that the preparation contains 47% alcohol, it is impossible to avoid the conclusion that *the purchaser intends to use the bitters as a beverage* and not as a

medicine, and that *the seller knows that such is his purpose.* The time, place and circumstances of the sale make it plain that the bitters were not intended as a medicine." (Italics ours.)

In sustaining an objection to a question as to whether bitters could be used for beverage purposes, the trial court stated (p. 605):

> "The question before the jury is whether it *was used for beverage purposes.*" (Italics ours.)

The Court of Appeals held that this ruling was correct.

In answering another point raised by appellants, the court said (p. 606):

> "There is no serious dispute in the case as to the fact that the bitters in question were sold upon appellant's premises by his agent for the purpose and with the intent that the bitters should be drunk upon the premises."

And,

> "The fact is that there is no evidence whatever which would justify the conclusion that the bitters were sold for any purpose other than as a beverage."

Thus, in the *Burnstein* case the defendant did not and could not deny that he sold the bitters in glasses to be drunk on the premises and that the bitters were in fact so consumed, his sole contention being that he sold the bitters for consumption as medicine and not as a beverage. Since the government agents bought and drank three "rounds" of the bitters at one time,

it can hardly be contended that the jury in that case was not justified in finding that the bitters were sold and consumed as a beverage and not as a medicine.

In the instant case, however, the government agent who bought the rubbing alcohol not only did not drink any of it, but he never intended to drink any of it. The agent himself so testified (R. p. 81) and there is no evidence to the contrary. Accordingly, there was no basis for any finding of the jury that the agent did intend to drink the rubbing alcohol, and without such intent of the purchaser the regulation cannot be violated.

Appellee attempts to show that the *Burnstein* case is in point by the statement that if Johnson had taken a drink, appellants would have contended that the taking of the drink was simply a subterfuge for the purpose of obtaining evidence and not for the real purpose of consuming the alcohol as a beverage. We have never contended and do not now contend that if Johnson had actually used the denatured alcohol as a beverage, the regulation would not have been violated, assuming, of course, that sales to him were made under circumstances from which appellants might reasonably have deduced that it was Johnson's intention to procure the denatured alcohol for use for beverage purposes. As we have stated repeatedly, our sole contention as respects this issue is that he did not intend to and did not, in fact, use it as a beverage.

The statement that the Circuit Court of Appeals for the Fourth Circuit in the case of *Massei v. United States,* 295 Fed. 683, came to an opposite conclusion

to that urged in the *Sherman* case in construing the identical statute is not correct. This appears conclusively from the following quotation from the opinion (p. 684):

> "The conclusive answer to the defendant's present claim that it was not proved that the extracts were fit for beverage purposes is supplied by the testimony of one of the purchasers who swore that he paid 50¢ for the extract because that would give him a good drunk, while it would cost $1.50 to get enough corn liquor to bring about that same longed-for result."

In no place in that case did it appear that the extract in question was purchased by a government agent or for evidentiary purposes, or that the purchaser did not intend to and did not, in fact, drink the extract. There is thus no similarity between the facts and the issue in that case and the instant case.

Appellee also states that the regulation in question does not say anything about the intent of the purchaser. A reading of the regulation will show that this statement is not correct, and that the contrary is the fact, since the only intention referred to is "the intention of the purchaser".

Appellee's last contention on this point is that if the testimony of government agents, like that of witness Johnson, is held not competent, it would be impossible to convict persons violating this regulation. It seems odd that in the instant case, though the government claims that the store in question was "frequented" by rubbing alcohol drunkards, and the gov-

ernment agent and policeman who testified claimed that they talked to some of these men and they knew their names, not one of them was produced as a witness by the government. In all of the other cases which we have been able to find which deal with statutes similar to the regulation in question (excepting the case of *Burnstein v. United States,* supra, where the government agents themselves actually drank the substance), the government has been able to produce witnesses who purchased and used the substances for beverage purposes. We do not believe, nor does the record herein indicate, that the necessity of producing such witnesses presents an insurmountable obstacle to the enforcement of the regulation.

APPELLANTS DID NOT AND DO NOT CONCEDE THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANTS UNDER ANY OF THE COUNTS OF THE INDICTMENT.

In discussing appellants' Assignments of Errors 2 and 6 (pp. 16 and 17 of appellee's brief), appellee states that appellants conceded there was sufficient evidence to go to the jury as to the last two sales made on April 15, 1939. Any concession that might have appeared in appellants' argument was, of course, limited solely to the matter then being discussed; that is, it was our contention that even if Johnson had actually used the denatured alcohol which he purchased as a beverage, there was no evidence of circumstances from which the appellants might have reasonably deduced that it was his intention to do so, and, therefore, that even

though Johnson had drunk the denatured alcohol, there could in no event have been a conviction except possibly for the last two sales. Of course we believe it must be apparent that we did not and do not concede that any of the sales made to Johnson, regardless of the circumstances under which they were made, constituted a violation of the regulation.

APPELLEE'S FAILURE TO ANSWER APPELLANTS' CONTENTION THAT THERE WAS DOUBLE PUNISHMENT MAKES IT APPARENT THAT THIS OCCURRED. THE CASES CITED BY APPELLEE DO NOT ANNOUNCE ANY DIFFERENT RULE THAN IS STATED IN THOSE CITED BY APPELLANTS.

We do not disagree with any of the cases cited by appellee in discussing the question of double punishment, but we do disagree with appellee's statements of the facts existing in these cases, and with its statements as to the rules announced in these cases. Appellee states that the charge in Counts 2 to 11 inclusive was the sale of alcohol for beverage purposes and that it was not an element of this offense that the containers did not have affixed thereto the required strip stamp. It further states that the charge in Counts 12 to 21 inclusive was the sale of alcohol in containers on which no stamp was affixed. It is only necessary to glance at the counts to see that this statement of appellee does not set forth the whole of the charge. The charge in Counts 12 to 21 inclusive was the sale of denatured alcohol under circumstances from which the appellants might have deduced the intention of the purchaser to procure the same for

use for beverage purposes, and that the sale was made in unstamped containers. Therefore, to convict under Counts 12 to 21 inclusive, it was necessary for appellee to prove the sale of denatured alcohol under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, *and* that the sale was made in unstamped containers, and to convict under Counts 2 to 11 inclusive it was necessary to prove only one of these elements, namely, the sale of denatured alcohol under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes. If appellee had reversed the order in which it discussed the two groups of indictments, that is, discussed Counts 12 to 21 inclusive first, and then Counts 2 to 11 inclusive, it would have definitely appeared that there was double punishment. It has been settled without question that where a defendant is being or has been tried for an offense containing several elements, he cannot at the same time or subsequently be tried for an offense which includes some of these elements, unless the latter offense also includes elements not appearing in the first offense charged.

> *Krench v. United States,* 42 Fed. (2d) 354;
> *Rouda v. United States,* 10 Fed. (2d) 916;
> *Tritico v. United States,* 4 Fed. (2d) 664.

As is stated in the case of *Morey v. Commonwealth,* 108 Mass. 433 (cited with approval in *King v. United States,* 31 Fed. (2d) 17), it is only where each statute requires proof of an additional fact which the other

does not that an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. Certainly, Counts 2 to 11 inclusive did not require the proof of any facts in addition to those which were required under Counts 12 to 21 inclusive, nor does appellee contend otherwise. The true rule is stated in the case of *Blockberger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (p. 309):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

or, as it is stated in another way, in the case of *Bertsch v. Snook,* 36 Fed. (2d) 155 (p. 156):

> "The same offense is charged by two separate counts of an indictment where the evidence required to support a conviction upon one count would have been sufficient to warrant a conviction upon the other."

Counts 2 to 11 inclusive did not require proof of any fact in addition to those required by Counts 12 to 21 inclusive, and the evidence sufficient to support a conviction under the latter counts would be sufficient to support a conviction under the earlier counts.

In the case of *King v. United States,* 31 Fed. (2d) 17, one of the cases cited by appellee, the defendant was convicted of selling morphine not from the orig-

inal stamped package, and of sending the same morphine in interstate commerce without having paid the special tax. The court held (p. 18):

> "It will be observed at a glance that the offenses charged in the two indictments are not the same in law, and that the evidence required to support the first indictment would not support the second inasmuch as there may be a sale of narcotics without a shipment in interstate commerce and there may be a shipment in interstate commerce without a sale."

The court then quoted with approval from *Morey v. Commonwealth,* 108 Mass. 433, and finally said (p. 19):

> "And in the Morgan case, in order, apparently, to end further controversy, the court said: '* * * this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them;' "

and that there is no double jeopardy

> "unless the first crime was included within the second as a matter of law".

There is no question but that the alleged crimes charged in Counts 2 to 11 inclusive were, as a matter of law, included in the crimes charged in Counts 12 to 21 inclusive. Appellee cites the case of *Macklin v. United States,* 79 Fed. (2d) 756, as authority for its statement that the test of identity is whether the same evidence is required to sustain both. In that case the court held that there was no double jeopardy because (p. 758):

> "Each offense requires a different proof * * *."

In the case of *Remaley v. Swope,* 100 Fed. (2d) 31, the court said (p. 33):

> "* * * the rule has been developed that where two offenses are charged, having relation to the same matter or transaction, there is no double jeopardy * * * *if each offense requires proof of a fact which the other does not.*" (Italics ours.)

This is certainly not the situation in the instant case.

The case of *United States v. One Oldsmobile Coupe,* 22 Fed. (2d) 441, was a libel proceeding against an automobile because of the transportation therein of certain whiskey. The owner of the car had, prior to the institution of that proceeding, pleaded guilty to *possessing* intoxicating liquor. He was not being prosecuted for the offense of *transporting* intoxicating liquor. The court merely stated that unlawful possession of intoxicating liquor and transportation thereof are two separate offenses under the National Prohibition Act, and that the conviction of one is not a bar to the prosecution of the other. It is apparent that in the libel proceeding there was no real question of double jeopardy because the owner of the car had been prosecuted for but one crime.

The indictment in the case of *Ross v. United States,* 103 Fed. (2d) 600, was for a violation of 18 U.S.C.A. 334, which provided that whoever knowingly deposited obscene matter in the mail for the purpose of circulating or disposing of the same was guilty of a crime. Prior to the commencement of the action, appellant had been acquitted on an indictment based upon 18 U.S.C.A. 339, which provided that whoever used

any fictitious name for the purpose of conducting any unlawful business by means of the postal service was guilty of a crime. It was not necessary to prove under the indictment in the first proceeding that the letter in question was obscene, nor did the indictment so allege, and under the indictment in the second proceeding it was not necessary to prove the use of a fictitious name; in other words, each indictment contained an element which the other did not, and therefore on neither indictment could the defendant have been convicted with only the evidence necessary under the other. All that the court stated was (p. 602):

> "Of course it is not always true * * * that if any one essential element of an offense upon which a defendant is put to trial is also an essential element of another alleged offense that the jeopardy rule applies to prevent a trial upon the latter one."

APPELLEE HAS CITED CASES WHICH HOLD THAT AN EMPLOYEE CAN BE CONVICTED OF A VIOLATION OF 26 U.S.C.A. 1397(a)(1), BUT WE BELIEVE THE BETTER AND MORE LOGICAL RULE IS STATED IN THE CASE OF ANDERSON v. UNITED STATES, 30 FED. (2d) 485, THAT IS, THAT ONLY AN OWNER WHO CONDUCTS THE BUSINESS CAN VIOLATE THIS SECTION.

We admit that the cases cited by appellee in answer to our argument that Dehne should not have been convicted under Count 1, announce a different rule from that announced in the case of *Anderson v. United States,* 30 Fed. (2d) 485. However, this point has not, to our knowledge, been passed upon by the Supreme Court, and in the only case cited by appellee

in which certiorari was granted (*Wainer v. United States,* 299 U.S. 92, 57 S. Ct. 79, 81 L. Ed. 58), it was limited to the question as to whether the statute under consideration was repealed by the National Prohibition Act. We believe that the rule announced in the *Anderson* case should be followed in this proceeding.

APPELLANT DEHNE DID NOT DIRECT THE OTHER EMPLOYEES TO MAKE SALES, AS WAS INTIMATED BY APPELLEE, NOR DID HE PARTICIPATE IN SALES BY OTHER EMPLOYEES, AND THEREFORE, EVEN IF WE ASSUMED THAT THE GOVERNMENT WITNESS TESTIFIED HE DRANK THE DENATURED ALCOHOL, DEHNE SHOULD NOT HAVE BEEN CONVICTED FOR MORE THAN THE FOUR SALES MADE BY HIM.

Appellee's only answer to appellant Dehne's contention that in any event he should not have been convicted for more than four of the sales, is that Dehne was the manager of the store and had authority to direct the action of the clerks with reference to the sale of the alcohol. Appellee further states that the record (R. pp. 150, 167, 183), shows that Dehne conferred with the clerks with reference to their conduct in the sale of alcohol. However, the portions of the record referred to show only that in discussions between Dehne and the clerks, they decided not to sell denatured alcohol to anyone who they thought was going to drink it, and that that question should be decided by the clerk making the sale. Certainly, unless Dehne instructed the clerks to sell the denatured alcohol to anyone who asked for it—and the record does not show that this was the fact—he could

not know the circumstances under which the other clerks made the sales, and even under 18 U.S.C.A. 550 he would not be a principal. We desire to again call the court's attention to the fact that our inferential admission that Dehne could have been convicted for four sales was limited to the point then being discussed, that is, it was our contention that even if Johnson had testified that he drank the denatured alcohol, and the circumstances indicated his intention to do so, appellant Dehne could not have been convicted for more than four of the sales made.

THE THEORY UPON WHICH APPELLEE RELIES IN SUPPORT OF ITS CONTENTION THAT NO EVIDENCE OF CRIMES OTHER THAN THOSE SET OUT IN THE INDICTMENT WAS INTRODUCED, NAMELY, THAT APPELLANTS WERE CHARGED WITH CARRYING ON A CONTINUOUS ILLEGAL BUSINESS, IS NOT TENABLE, AND THEREFORE THE EVIDENCE IN QUESTION WAS IMPROPERLY ADMITTED.

Appellee's only answer to our contention that the trial court committed error in permitting the introduction of testimony concerning other alleged violations is that Count 1 of the indictment alleges generally that the appellants conducted a business as a retail liquor dealer. We again desire to call the court's attention to the fact that Count 1 contains no general allegation that the appellants conducted the business of a retail liquor dealer. On the contrary, the allegation is single and specific that such a business was conducted "in that" the particular sales to Johnson were made on designated dates. For that reason, the cases cited by appellee are not in point

and need not be discussed. We reiterate that any evidence as to alleged acts other than those specifically charged was irrevelant, and its admission seriously prejudiced the appellants and was reversible error.

CONCLUSION.

We do not believe that appellee has answered the points we raised in our opening brief, and we therefore again respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,
April 8, 1940.

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